

9-1-1993

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Recommended Citation

Michael P. Stevens, *Limits on Supplemental Environmental Projects in Consent Agreements to Settle Clean Water Act Citizen Suits*, 10 GA. ST. U. L. REV. (1993).

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LIMITS ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS IN CONSENT AGREEMENTS TO SETTLE CLEAN WATER ACT CITIZEN SUITS

INTRODUCTION

One of the most controversial and most frequently litigated provisions of the Federal Clean Water Act (CWA)¹ is section 505, which provides for citizen suits.² The first environmental statute to include a citizen suit provision was the Clean Air Act as amended in 1970.³ Congress, in introducing the provision, recognized that federal enforcement of environmental laws lacked both motivation and resources.⁴ Citizen suits would effectively supplement government enforcement action.⁵ For similar reasons, a citizen-suit provision was included in the CWA when it was enacted in 1972.⁶

Proponents of citizen suits have argued that, in addition to supplementing and perhaps motivating government enforcement action, such suits are less expensive than government action.⁷ Citizen suits may be more effective than government action because citizen-plaintiffs, as directly affected parties, are better able to weigh the advantages and disadvantages of legal action.⁸ Citizen suits could result in greater penalties against a polluter.⁹

On the other hand, opponents have contended that citizen suits clog the courts with excessive, frivolous, and harassing

1. 33 U.S.C. §§ 1251-1376 (1988 & Supp. II 1990).

2. 33 U.S.C. § 1365 (1988).

3. 42 U.S.C. §§ 7401-7671 (1988 & Supp. II 1990). Section 7604 is the citizen suit provision. *Id.* § 7604.

4. See POLICY DIVISION, CONG. RES. SERV., U.S. LIBRARY OF CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, at 436-39, cited in David S. Mann, Comment, *Polluter-Financed Environmentally Beneficial Expenditures: Effective Use or Improper Abuse of Citizen Suits Under the Clean Water Act?*, 21 ENVTL. L. 175, 180-81 (1991). Mr. Mann's Comment was a major source of information and organization for the present article.

5. Mann, *supra* note 4, at 180.

6. *Id.* at 181.

7. Doris K. Nagel, Comment, *Environmental Law—Citizen Suits and Recovery of Civil Penalties*, 36 KAN. L. REV. 529, 532 (1988).

8. *Id.* (citing J. Mashaw, *Private Enforcement of Public Regulatory Provisions: The "Citizen Suit,"* 4 Class Action Rep. 29, 33 (1975)).

9. *Citizen Suits Yield Higher Industry Fines; Lawyers Suggest Avoidance, Early Settlements*, [1991-92] 22 Env't Rep. Cas. (BNA) 2442 (Feb. 28, 1992).

litigation.¹⁰ The "agency-forcing" aspect of citizen suits undermines prosecutorial discretion.¹¹ Citizen suits have been accused of being unfair and inconsistent, perhaps because citizen-plaintiffs often lack the technical expertise available to administrative agencies for assessing the merits of potential actions.¹² A middle ground is the position of the United States Environmental Protection Agency (EPA): citizen suits are acceptable as long as they remain strictly a supplement to government enforcement action.¹³

The controversial nature of section 505 is reflected in the amount of litigation that has arisen from it. Section 505 delineates in detail a citizen's right to sue under the CWA, and the issues that arise from each part of section 505 have resulted in numerous court actions: standing to sue (§ 505(a), (g));¹⁴ notice to the EPA or other agency (§ 505(b)(1)(A));¹⁵ statute of limitations;¹⁶ preemption (§ 505(b)(1)(B));¹⁷ and attorney fees (§ 505(d)).¹⁸

10. Nagel, *supra* note 7, at 532-33; *see also* Mann, *supra* note 4, at 180.

11. Nagel, *supra* note 7, at 532.

12. *Id.* at 532-33.

13. Telephone Interview with David Drelich, Counsel, EPA Office of Enforcement and Compliance Monitoring (Sept. 15, 1992) [hereinafter Drelich Interview].

14. 33 U.S.C. § 1365(a), (g) (1988); *see, e.g.*, *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 64 (1987) (noting § 505(a) confers jurisdiction over citizen suits when plaintiffs make good faith allegations of continuous or intermittent violations, but not wholly past violations); *Citizens Coordinating Comm. on Friendship Heights, Inc. v. Washington Metro. Area Transit Auth.*, 765 F.2d 1169, 1172 (D.C. Cir. 1985) (holding owner of shopping mall a mile and a half from stream damaged by illegal discharge lacked standing to sue under CWA).

15. 33 U.S.C. § 1365(b)(1)(A) (1988); *see, e.g.*, *National Env'tl. Found. v. ABC Rail Corp.*, 926 F.2d 1096, 1097 (11th Cir. 1991) (sixty-day notice requirement of § 1365(b) mandatory).

16. *See, e.g.*, *Public Interest Res. Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 74 (3d Cir. 1990). Although CWA is silent, the federal five-year statute of limitations should override a state statute where latter would be at odds with the purpose of federal law. *Accord* *Sierra Club v. Simkins Indus., Inc.*, 617 F. Supp. 1120, 1125 (D. Md. 1985); *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 447 (D. Md. 1985).

17. 33 U.S.C. § 1365(b)(1)(B) (1988); *see, e.g.*, *EPA v. City of Green Forest*, 921 F.2d 1394, 1405 (8th Cir. 1990) (noting language of CWA encourages citizen suits when EPA decides not to take enforcement action); *cf.* *Antrim Mining, Inc. v. Davis*, 775 F. Supp. 165, 170 (M.D. Pa. 1991) (holding consent decree in citizen suit against industry did not bar state from enforcing own orders against industry for same violation).

18. 33 U.S.C. § 1365(d) (1988); *see, e.g.*, *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295 (2d Cir. 1987) (calculation of attorney fees following settlement of CWA citizen suit); *Proffitt v. Municipal Auth. of the Borough of Morrisville*, 716 F. Supp. 845 (E.D. Pa. 1989) (holding plaintiff obtaining consent decree to settle CWA

One of the most controversial issues raised over section 505, penalties is not described in section 505 itself. The penalty provisions are in section 309,¹⁹ which has also been the subject of frequent litigation, usually with respect to determining the amount of the penalty.²⁰ Other than setting a maximum, section 309 gives limited guidance about the appropriate amount.²¹

Neither section 309 nor section 505 discusses the disposition of the penalty after it is collected.²² The Supreme Court has decided that when liability is found in a CWA citizen suit, any payment by the violator is a penalty and must be deposited in the United States Treasury.²³ Less clear is the fate of payments to plaintiffs, usually environmental advocacy groups, that have been negotiated without or prior to a court's finding of liability. Numerous CWA citizen suits have been resolved by negotiated consent agreement²⁴ in which payments were made to funds or projects related to the violation. These projects have variously been called "environmentally beneficial expenditures,"²⁵ "mitigation projects,"²⁶ or, as the EPA prefers and, as this Comment will hereafter refer to them, "supplemental environmental projects."²⁷

citizen suit was prevailing party entitled to attorney fees); *accord* Atlantic States Legal Found. v. Tyson Foods, 897 F.2d 1128, 1143 (11th Cir. 1990).

19. 33 U.S.C. § 1319 (1988 & Supp. II 1990).

20. *See, e.g.*, Atlantic States Legal Found., Inc. v. Tyson Foods, 897 F.2d at 1138 (applying daily maximum penalty for violations of permit limits under CWA separately to each violation); Atlantic States Legal Found., Inc. v. Universal Tool and Stamping Co., Inc., 786 F. Supp. 743, 753 (N.D. Ind. 1992) (requiring amount of civil penalty under CWA be high enough so that it is not just "cost of doing business," but will encourage curtailing pollution); Friends of the Earth v. Archer Daniels Midland Co., 780 F. Supp. 95, 103 (N.D.N.Y. 1992) (concluding \$25,000 negotiated settlement was less than desirable, but was not low enough to disserve the goals of the CWA).

21. 33 U.S.C. § 1319(d) (1988).

22. *But see infra* notes 252-56 and accompanying text (describing proposed CWA amendments which authorize substituting mitigation project for all or part of penalty).

23. *See, e.g.*, Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 53 (1987) ("[T]he court may . . . impose civil penalties payable to the United States Treasury."); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n., 453 U.S. 1, 14 n.25 (1981) ("Under the [CWA], civil penalties, payable to the Government, also may be ordered by the court.").

24. LISA JORGENSEN & JEFFREY J. KIMMEL, ENVIRONMENTAL CITIZEN SUIT: CONFRONTING THE CORPORATION (A BNA SPECIAL REPORT) 19 (1988) (noting 48 of 882 CWA citizen suits in 1987 settled out of court).

25. *See* Mann, *supra* note 4.

26. *See* Atlantic States Legal Found., Inc. v. Simco Leather Corp., 755 F. Supp. 59, 61 (N.D.N.Y. 1991).

27. *See* EPA, POLICY ON THE USE OF SUPPLEMENTAL ENFORCEMENT PROJECTS IN

The CWA amendments of 1987 empowered the EPA to object to such settlements.²⁸ The EPA has contended that any monetary settlement of CWA violations was a penalty payable to the Treasury.²⁹ Since 1987, the concept of settlements has survived government challenges at the district court level.³⁰ The first clear appellate court approval of a supplemental environmental project was *Sierra Club, Inc. v. Environmental Controls Design, Inc. (ECD)*³¹ in which the Ninth Circuit upheld a consent judgment granting payments to private environmental organizations despite the U.S. Government's contention that such payments must be penalties payable to the Treasury.³²

ECD has been hailed as a trend-setting decision,³³ legitimizing supplemental environmental projects. This Comment provides a history of these projects before *ECD* and updates their status since *ECD*, and will conclude that while the impact of *ECD* has been limited, at least outside the Ninth Circuit, supplemental environmental projects as a remedy in CWA citizen suits are here to stay.³⁴

EPA SETTLEMENTS (Feb. 12, 1991) [hereinafter SUPPLEMENTAL PROJECT POLICY].

28. 33 U.S.C. § 1365(c)(3) (1988) reads:

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator [of EPA]. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

Id.

29. See, e.g., *Sierra Club, Inc. v. Environmental Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990).

30. *Pennsylvania Env'tl. Defense Found. v. Bellefonte Borough*, 718 F. Supp. 431, 437 (M.D. Pa. 1991); *National Resources Defense Council, Inc. v. Interstate Paper Corp.*, [1989] 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 20901 (S.D. Ga. Nov. 22, 1988) (upholding consent decree containing payment to Georgia Conservancy for education). Although the project proposed in this settlement did not comply with EPA policy, mitigation projects in general were acceptable as long as they "closely addressed the . . . effects of . . . the violation." See *infra* notes 76-97 and accompanying text.

31. *ECD*, 909 F.2d at 1350.

32. *Id.* at 1352, 1356.

33. Heather M. McBreen, Note, *Citizens' Suits, Civil Penalties, and the Use of Private Consent Agreements Under the Clean Water Act—Sierra Club, Inc. v. Environmental Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990), 10 TEMP. ENVTL. L. & TECH. J. 233 (1991). Ms. McBreen's Note also provided direction and sources of information for the present Comment. See also Mann, *supra* note 4.

34. See Elizabeth R. Thagard, *The Rule That Clean Water Act Civil Penalties Must Go to the Treasury and How to Avoid It*, 16 HARV. ENVTL. L. REV. 597 (1992). Ms. Thagard analyzes *ECD* and its progeny through 1991 and proposes several methods to ensure that CWA settlement payments go to remedying the violations. See *infra*

I. NEGOTIATED SETTLEMENTS BEFORE *ECD*

A. Cases Before 1987 CWA Amendments

Through 1987, 882 citizen suits were filed against alleged violators of the CWA.³⁵ Forty-eight of these actions resulted in out-of-court settlements.³⁶ Many of the settlements included payments to the environmental group-plaintiff for purposes related to the violation. For example, in *Citizens Coordinating Committee on Friendship Heights, Inc. v. Washington Metropolitan Area Transit Authority*,³⁷ the terms of a consent decree settling CWA citizen action against the defendant transit authority included a payment of \$10,000 to the Little Falls Branch Improvement Fund.³⁸ The issue before the court was the amount of attorneys' fees, not the validity of the payment.³⁹ In *Friends of the Earth v. Eastman Kodak Co.*,⁴⁰ two environmental groups sued Kodak for numerous violations of its discharge permit. Under a pretrial settlement, Kodak made a \$49,000 contribution to the Conservation Foundation.⁴¹ The court held that on the basis of the settlement, the plaintiffs had been "successful" and were entitled to attorneys' fees.⁴² Again, the issue of whether the settlement was legal under the CWA did not arise.⁴³

B. Government Policy

The Government's position regarding payments to supplemental environmental projects was ambiguous. The EPA

note 272.

35. JORGENSEN & KIMMEL, *supra* note 24, at 19.

36. *Id.*

37. 568 F. Supp. 825 (D.D.C. 1983), *rev'd on other grounds*, 765 F.2d 1169 (D.C. Cir. 1985).

38. *Citizens Coordinating Comm.*, 568 F. Supp. at 826-27.

39. *Id.* at 825-26.

40. 656 F. Supp. 513 (W.D.N.Y.), *aff'd*, 834 F.2d 295 (2d Cir. 1987).

41. *Kodak*, 656 F. Supp. at 514.

42. *Id.* at 515. Kodak, in contesting the legal fees, claimed that the contribution was strictly a nuisance settlement. *Id.*

43. See also *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, [1987] 17 Env't Rep. Cas. (BNA) 1781 (D. Md. Feb. 20, 1987) (\$1.5 million paid into fund to help clean Chesapeake Bay). A comprehensive list of citizen suits under the CWA and other environmental statutes appears in JORGENSEN & KIMMEL, *supra* note 24, at app. 2; see Marcia R. Gelpe & Janis L. Barnes, *Penalties in Settlements of Citizen Suit Enforcement Actions Under the Clean Water Act*, 16 WM. MITCHELL L. REV. 1025, 1032 n.35-38 (1990) (providing description of how payments were distributed).

appeared to accept the existence of the projects under certain conditions. Alternatives to penalty payments were discussed in EPA's policy on civil penalties⁴⁴ and Clean Water Act penalty policy for civil settlement negotiations,⁴⁵ which describe the rationale for determining appropriate penalties in EPA enforcement actions. The penalty policy stated that the EPA "will consider accepting additional environmental cleanup, and mitigating the penalty figures accordingly. But normally, the [EPA] will only accept this arrangement if agreed to in pre-litigation settlement."⁴⁶ In the settlement policy, mitigation projects were specifically mentioned. Such a project would count toward reduction of a penalty if it met the following criteria:

1. The activity would supplement, not replace, full compliance.
2. The activity would closely address the violation that caused the enforcement action.
3. The amount of the mitigation must reflect the defendant's actual cost.
4. The defendant must commit, in good faith, to attaining compliance.
5. The deterrent effect must not be diminished.⁴⁷

The EPA policies were clear, however, with respect to the limits of the agency's acceptance of supplemental environmental projects. Both policies spoke of the projects only as reducing, not replacing, penalties to the Treasury.⁴⁸ Since deterrence was a main objective of enforcement, mitigation projects were to be the exception rather than the rule, and a substantial penalty should be included in every settlement.⁴⁹ It should be noted that both EPA policies were intended to guide enforcement actions by the EPA, not private plaintiffs.⁵⁰

44. EPA, CIVIL PENALTY POLICY (Feb. 16, 1984) [hereinafter PENALTY POLICY].

45. EPA, CLEAN WATER ACT PENALTY POLICY FOR CIVIL SETTLEMENT NEGOTIATIONS (Feb. 11, 1986) [hereinafter SETTLEMENT POLICY].

46. PENALTY POLICY, *supra* note 44, at 6.

47. SETTLEMENT POLICY, *supra* note 45, at 6-7.

48. PENALTY POLICY, *supra* note 44, at 6; SETTLEMENT POLICY, *supra* note 45, at 7.

49. SETTLEMENT POLICY, *supra* note 45, at 7.

50. See PENALTY POLICY, *supra* note 44, at 1 ("This document . . . establishes a single set of goals for penalty assessment in EPA . . . enforcement actions."); SETTLEMENT POLICY, *supra* note 45, at 2 ("This penalty policy applies to Federal CWA civil judicial enforcement actions . . ."). The paragraph containing the quoted language goes on to list which provisions of the CWA were and were not covered.

1994] LIMITS ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS 763

Many consent agreements between citizen-plaintiffs and alleged violators of the CWA included substantial penalties to the U.S. Treasury.⁵¹ In general, the EPA did not object to negotiated settlements. However, the Justice Department, which typically represented the EPA in civil enforcement actions, opposed supplemental environmental projects.⁵² Most importantly, payments from violations of the CWA were considered penalties, and failure to pay penalties to the Treasury was itself a violation of the CWA.⁵³ Furthermore, the need for enforcement actions to deter future violations required that the violator be penalized.⁵⁴ By allowing polluters to avoid paying the Government, the projects would undermine the deterrent effect as well as provide a benefit to polluters in the form of tax deductions for the projects.⁵⁵ Also, the projects complicated government enforcement efforts and were themselves difficult to enforce.⁵⁶ Finally, the Justice Department was concerned that alternative settlements would spread to other types of law enforcement for which they would be even less appropriate.⁵⁷

Section 505 is not mentioned in either document. *Id.*

51. JORGENSEN & KIMMEL, *supra* note 24, at app. 2, *cited in* Gelpe & Barnes, *supra* note 43, at 1032 n.39 (describing eight cases which involved environmental project funds and also included payments to the Treasury).

52. Gelpe & Barnes, *supra* note 43, at 1029-30.

53. See Drelich Interview, *supra* note 13. The Miscellaneous Receipts Act, 31 U.S.C. § 3302 (1988), which requires that all parties in custody of public money must deposit it into the Treasury within three days, is often cited as justification that all payments in settlement of CWA suits must go to the Treasury.

54. See Gelpe & Barnes, *supra* note 43, at 1030 (citing *A Bill to Clarify the Authority of the Administrator to Utilize Environmental Improvement Projects When Enforcing the Ocean Dumping Act and the Clean Water Act and an Oversight on the Use of Environmental Improvement Projects in Enforcement Proceedings Under the Clean Water Act and the Ocean Dumping Act: Hearing on H.R. 3411 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment and the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 100th Cong., 1st Sess. 20-22 (1987) (statement of Raymond Ludwizewski, Associate Deputy Attorney General, U.S. Department of Justice) [hereinafter Ludwizewski Statement]); Mann, *supra* note 4, at 198. Both of these articles critique in detail the Justice Department's objections to supplemental environmental projects. Gelpe & Barnes, *supra* note 43, at 1030-31; Mann, *supra* note 4, at 197-200.

55. Ludwizewski Statement, *supra* note 54.

56. *Id.*

57. *Id.*

C. CWA Amendments

As a result of the Justice Department's objections, Congress, in 1987, amended both sections 309 and 505 of the CWA.⁵⁸ Legislators added section 505(c)(3), which required that in an action to which the United States was not a party, a copy of any proposed consent decree be submitted to the Attorney General and the EPA at least forty-five days before entry of the judgment.⁵⁹ Motivated by a stated concern with protecting the public from "abusive, collusive, or inadequate settlements," the addition would allow the EPA to comment, object, or intervene in every proposed consent decree involving a private plaintiff.⁶⁰ The overall concept of alternative settlements met with Congress' at best limited approval.⁶¹

Section 309(g)(6) was added,⁶² under which no citizen suits could be filed if the EPA, the Interior Department, or any state agency had already either "commenced and [was] diligently prosecuting an action"⁶³ or had issued a final order for which a penalty had already been assessed.⁶⁴ A citizen suit filed prior to EPA action was permissible.⁶⁵

D. Negotiated Settlements After the CWA Amendments

Despite the limiting effects of the 1987 CWA amendments, negotiated settlements of citizen suits continued to include supplemental environmental projects. For instance, in 1988 Minnesota Mining and Manufacturing (3M) agreed to pay \$158,000 to settle a suit by the Atlantic States Legal Foundation, Inc. and Citizens for a Better Environment for violations of 3M's permit to discharge into the Mississippi River.⁶⁶ The settlement terms included \$85,000 in payments to a variety of environmental projects in Minnesota, mostly related to either

58. See 33 U.S.C. §§ 1319, 1365 (1988).

59. *Id.* § 1365(c)(3).

60. 131 CONG. REC. S8097 (daily ed. June 13, 1985) (statement of Sen. Chafee).

61. See H.R. CONF. REP. NO. 1004, 99th Cong., 2d Sess. 1 (1986).

62. 33 U.S.C. § 1319(g)(6) (Supp. II 1990).

63. *Id.* § 1319(g)(6)(A)(i), (ii).

64. *Id.* § 1319(g)(6)(A)(iii).

65. *Id.* § 1319(g)(6)(B).

66. Atlantic States Legal Found., Inc. v. 3M, [1987-88] 18 Env't Rep. Cas. (BNA) 2395 (D. Minn. Mar. 18, 1988).

1994] LIMITS ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS 765

environmental education or water quality of the Mississippi River.⁶⁷ Another \$50,000 was to go to the U.S. Treasury.⁶⁸

No payment to the Treasury was included in the Port Townsend Paper Corporation's 1988 settlement with the Sierra Club, despite the Justice Department's objection that the enforcement award was a penalty and a portion should go to the Treasury.⁶⁹ The settlement included \$137,500 to the Nature Conservancy to purchase wetlands around Puget Sound.⁷⁰

In 1990, the Upjohn Company signed a consent agreement with the Connecticut Fund for the Environment and the Natural Resources Defense Council to settle a suit over violations of Upjohn's permit to discharge into the Quinnipiac River.⁷¹ Upjohn agreed to pay \$1.2 million to establish a trust fund to help clean the river.⁷² No penalty to the Treasury was included, nor did the Government object.⁷³ This settlement was reached after a court held Upjohn liable for the violations.⁷⁴

The Government was not slow, however, to exercise its power under section 503(c)(3).⁷⁵ A number of proposed consent agreements were challenged because of the disposition of the payments. The results of these challenges varied. In *Natural Resources Defense Council, Inc. v. Interstate Paper Corp.*,⁷⁶ the terms of a proposed consent decree included payments of \$15,000 to the U.S. Treasury, \$55,250 to the Trust for Public Land for

67. *Id.* at 2396.

68. *Id.* at 2395.

69. *Sierra Club, Inc. v. Port Townsend Paper Corp.*, [1988] 19 Env't Rep. Cas. (BNA) 1434 (W.D. Wash. Feb. 23, 1987).

70. *Id.* at 1434.

71. *Connecticut Fund for the Env't v. Upjohn Co.*, [1990] 21 Env't Rep. Cas. (BNA) 9 (D. Conn. Mar. 31, 1990).

72. *Id.*

73. *Id.* This may have been because the court did not require that the government be notified. *See infra* note 177.

74. *Id.* Many citizen suits were joint actions in which the private plaintiffs were joined by one or more government agencies. Not surprisingly, the settlements included payments for supplemental environmental projects and penalties to state or federal treasuries. *See, e.g.*, *Atlantic States Legal Found., Inc. v. Koch Refining Co.*, [1988-89] 19 Env't Rep. Cas. (BNA) 2474 (D. Minn. Jan. 11, 1989). In joint action by the Atlantic States Legal Foundation, the State of Minnesota, and the EPA, \$200,000 was paid to private environmental projects, \$460,000 to the state, and \$1.54 million to the U.S. Treasury. *Sierra Club v. Union Oil Co. of Cal.*, [1989-90] 20 Env't Rep. Cas. (BNA) 1851 (N.D. Cal. Feb. 22, 1990). Union Oil paid \$1 million to the State of California and \$2.72 million to the Trust for Public Land.

75. 33 U.S.C. § 1365(c)(3) (1988).

76. [1989] 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 20901 (S.D. Ga. Nov. 22, 1988).

wetlands mitigation and study, and \$27,750 to the Georgia Conservancy for education.⁷⁷ The Government objected, first because the \$15,000 penalty component was not "substantial" as required under EPA's settlement policy.⁷⁸ The court disagreed: "This is a significantly large amount to maintain the perception in the public's eyes, as required under the policy, that the Government does not lack the 'resolve to impose significant penalties for substantial violations.'"⁷⁹ The Government also objected that the payment for education was not the type of mitigation project contemplated by the settlement policy.⁸⁰ The court agreed that although education projects had been approved in the past, they had been more closely related to the violations.⁸¹ The court acknowledged that the settlement policy should receive some deference, but concluded that since the parties had properly agreed to the project, it should be approved.⁸²

In contrast to this lenient application of the settlement policy, the district court in *Pennsylvania Environmental Defense Foundation v. Bellefonte Borough* construed the policy narrowly.⁸³ The Government raised two objections to a consent decree that had been proposed to resolve a suit over past illegal discharges from a municipal sewage treatment plant.⁸⁴ First, the decree contained no provision for civil penalties payable to the Treasury.⁸⁵ Second, the decree required Bellefonte to place \$35,000 into an escrow account for Trout Unlimited but did not specify that the money had to be used for a purpose related to the violations.⁸⁶

The court held first that the proposed consent decree could not be disapproved solely because it did not require payment of a penalty to the Treasury.⁸⁷ It reasoned that under *Gwaltney of*

77. *Id.* at 20902.

78. *Id.*; see SETTLEMENT POLICY, *supra* note 45, at 7.

79. *Interstate Paper*, [1989] 19 *Envtl. L. Inst.* at 20902; SETTLEMENT POLICY, *supra* note 45, at 7.

80. *Interstate Paper*, [1989] 19 *Envtl. L. Inst.* at 20902.

81. *Id.*

82. *Id.*

83. 718 F. Supp. 431 (M.D. Pa. 1989).

84. *Id.* at 433.

85. *Id.* at 435.

86. *Id.*

87. *Id.* at 436.

Smithfield v. Chesapeake Bay Foundation,⁸⁸ the plaintiff might not prevail at trial because there was no proof of ongoing violations by Bellefonte.⁸⁹ Therefore, the payment could not be a civil penalty, and it would be impermissible to disapprove of the order in the absence of that penalty.⁹⁰

However, the court held that the \$35,000 payment to the escrow account did not comport with the "mitigation project" rule of EPA's settlement policy,⁹¹ which stated that such a project must "closely address[] the environmental effects of the . . . violation."⁹² The court relied on the Supreme Court's holding in *Local No. 93, International Association of Firefighters v. City of Cleveland*,⁹³ that a federal court's approval of a consent decree depended upon its "further[ing] the objectives of the law upon which the complaint was based."⁹⁴ The decree in *Bellefonte Borough* simply stated that the money would be used "for the purposes of fulfilling the goals of the CWA."⁹⁵ Had the decree required that the money be used for projects related to Bellefonte's receiving stream, or even stated that it be used for a project which "closely address[ed] the environmental effects of the . . . violation," the court might have approved it.⁹⁶ Instead, the court remanded and gave the parties leave to redraft the decree in accordance with the holding.⁹⁷

The decisions in *Interstate Paper* and *Bellefonte Borough* differed as to the parameters of an approvable supplemental environmental project, but did not fully address the question of whether money for a supplemental project alone was an acceptable resolution for a CWA citizen suit or whether a payment to the Treasury was required. In *Interstate Paper*, the approved order contained a substantial penalty in addition to the project payment.⁹⁸ In *Bellefonte Borough* no penalty payment

88. 484 U.S. 49 (1987).

89. *Bellefonte Borough*, 718 F. Supp. at 436; 484 U.S. at 64.

90. Evidently, there was no reason why a settlement could not be negotiated even though the plaintiffs might not have a cause of action. See Gelpe & Barnes, *supra* note 43, at 1034 (analyzing thoroughly *Bellefonte Borough* and its implications).

91. 718 F. Supp. at 437; SETTLEMENT POLICY, *supra* note 45, at 7.

92. SETTLEMENT POLICY, *supra* note 45, at 7.

93. 478 U.S. 501 (1986).

94. *Id.* at 525.

95. *Bellefonte Borough*, 718 F. Supp. at 437.

96. *Id.*

97. *Id.*

98. [1989] 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 20901, 20902 (S.D. Ga. Nov. 22, 1988).

was required because no penalty would have been appropriate if the case had gone to trial.⁹⁹ The overall validity of supplemental environmental projects, in light of EPA's power to object since 1987, remained uncertain.

II. THE ECD DECISION

Almost one year after *Bellefonte Borough*, in *Sierra Club, Inc. v. Environmental Controls Design, Inc.*,¹⁰⁰ the Ninth Circuit appeared to clearly answer the question in favor of supplemental environmental projects. The Sierra Club sued Environmental Controls Design (ECD) under the CWA for illegal discharges of pollutants into Milk Creek,¹⁰¹ seeking declaratory and injunctive relief, civil penalties, and costs.¹⁰² The parties negotiated a consent agreement which, among other things, required that ECD pay the Sierra Club legal defense fund \$45,000 to "support projects dedicated to maintaining and protecting water quality in Oregon."¹⁰³ The Government was served with the proposed settlement under section 505(c)(3) and objected; because the money did not go to the Treasury, the judgment was "at odds with the [CWA]."¹⁰⁴ The Sierra Club argued that the money was not a penalty because it was paid under a pretrial agreement.¹⁰⁵

The district court took an unusual middle ground. First, it concluded that the money was a penalty under the CWA.¹⁰⁶ The court found that because remedies in a CWA citizen suit had to be either injunctive relief or civil penalties, and the relief in this case bore all the hallmarks of a penalty, then it had to be a penalty.¹⁰⁷ However, the court then looked at the goals of the

99. *Bellefonte Borough*, 718 F. Supp. at 436.

100. *Sierra Club, Inc. v. Environmental Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990). For detailed analyses of the decision, see McBreen, *supra* note 33; see also Thagard, *supra* note 34, at 520-22; John Bliss, Comment, *Greater Public Participation in the Enforcement of the Clean Water Act*, 9 PACE ENVTL. L. REV. 753 (1992); Mann, *supra* note 4, at 201-04.

101. *Sierra Club, Inc. v. Environmental Controls Design, Inc.*, 703 F. Supp. 875, 876 (D. Or. 1989).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 877.

106. *Id.*

107. *Id.* The court reasoned that damages were not available under the CWA so the payment could not be damages, and the Sierra Club had asked for attorney fees

1994] LIMITS ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS 769

CWA and determined that voluntary compliance by the parties, brought about by settlement, would further those goals by "putting the funds collected to use on behalf of environmental protection."¹⁰⁸ Relying on past consent decrees, the court reconciled the statutory requirement about disposal of penalties with the statutory goal of the most efficient environmental protection and held that the penalty must be deposited with the state environmental regulatory agency.¹⁰⁹ Funding a public environmental project would be within CWA goals and would better ensure that the money was available to the public.¹¹⁰

The Sierra Club appealed the refusal to enter the original consent decree.¹¹¹ The Ninth Circuit, after determining that it had jurisdiction to hear the timely appeal of the district court's decision to enter a consent decree,¹¹² reversed and remanded for entry of the original decree.¹¹³ The court agreed that based on Supreme Court precedent,¹¹⁴ civil penalties awarded under the CWA must be paid into the Treasury.¹¹⁵ However, because the payments derived from an out-of-court settlement before liability was found, the court held that they were not civil penalties.¹¹⁶ The court relied on the *Local No. 93*¹¹⁷ criteria used in *Bellefonte Borough*: the decree was valid if it came within the scope of the pleadings, furthered the statute's objectives, and did not violate the statute.¹¹⁸ The court also drew on *Citizens for a Better Environment v. Gorsuch*,¹¹⁹ in which a settlement agreement was held to be valid if it was "fair, reasonable and

which it could not be awarded unless it was the prevailing party, in which case the monetary award had to be a penalty. *Id.*

108. *Id.* at 877, 879.

109. *Id.* at 879.

110. *Id.* This decision was entered six months before *Bellefonte Borough*.

111. *Sierra Club, Inc. v. Environmental Controls Design, Inc.*, 909 F.2d 1350, 1352 (9th Cir. 1990).

112. *Id.* at 1353-54.

113. *Id.* at 1356.

114. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49 (1987); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n.*, 453 U.S. 1 (1981).

115. *ECD*, 909 F.2d at 1354.

116. *Id.*

117. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986).

118. *ECD*, 909 F.2d at 1354 (citing *Local No. 93*, 478 U.S. at 525).

119. 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984).

equitable and does not violate the law or public policy."¹²⁰ The *ECD* court held that the consent decree at issue fulfilled all of these requirements.¹²¹

ECD was the first appellate-level decision expressly addressing the issue of the validity of supplemental environmental projects under the CWA. The decision ratifying the use of the projects led some commentators to conclude that settlement as an alternative to litigation, including supplemental projects, would become easier in the future.¹²²

III. SUPPLEMENTAL ENVIRONMENTAL PROJECTS SINCE *ECD*

This Comment will now describe events in the four years since *ECD* in the courts, in the EPA, and in Congress. It concludes that supplemental projects may be considered an established part of settlements which precede a finding of liability. Whether they will be equally widespread as remedies for all CWA citizen suits depends on EPA policy and the passage of the CWA reauthorization.

A. Case Law

Two cases decided at almost the same time as *ECD* gave opposing indications as to what might be the limit of its impact. *Northwest Environmental Defense Center v. Unified Sewerage Agency of Washington County*¹²³ went beyond *ECD* in its support of supplemental environmental projects. A consent decree

120. *ECD*, 909 F.2d at 1355 (citing *Gorsuch*, 718 F.2d at 1125-26).

121. *Id.*

122. See Thagard, *supra* note 34, at 522 ("[*ECD*] was a triumph for environmental groups settling CWA lawsuits out of court, but a disaster for those whose cases involve a judicial finding of liability."); Mann, *supra* note 4, at 204 ("The [*ECD*] decision appears to be based on sound law and policy and should provide a model for other . . . courts, making for more efficient approval of [supplemental environmental projects]."); McBreen, *supra* note 33, at 244-45 ("The [*ECD*] case is significant because it indicates that what may have started out as an anomaly has become a trend [The decision] represents a sound and well-grounded interpretation of the current state of the law under the [CWA]."). But see Bliss, *supra* note 100, at 780-86. Mr. Bliss criticizes the decision in *ECD* because it did not insure that the settlement money would be spent on public welfare. *Id.* at 780-81. He advocates that proponents of negotiated settlements should have to overcome a presumption that the settlement is not for a public purpose, by structuring the settlement to insure that public welfare is served. *Id.* at 782. Because of this shortcoming, he concludes that *ECD* might not be followed. *Id.* at 786.

123. [1991] 21 Env'tl. L. Rep. (Env'tl. L. Inst.) 20676 (D. Or. July 26, 1990).

was proposed to end the environmental group-plaintiff's two-year-old suit against a municipal sewer authority for illegal discharges in the Tualatin River.¹²⁴ The decree required two payments by the authority: \$100,000 to the State of Oregon to fund staff positions in its Department of Environmental Quality and \$900,000 to an environmental fund to protect the Tualatin River basin "in ways that cannot be mandated under the [CWA]."¹²⁵ The Justice Department, exercising its right to comment under section 505(c)(3), objected because the decree did not contain a penalty payable to the Treasury.¹²⁶

The court denied the Government's objections. Surprisingly, it first declared that the \$1 million was a penalty because it would not be paid to the plaintiffs.¹²⁷ Nonetheless, the court continued, the money should go to the river endowment fund because "[t]he purpose of the [CWA] is to improve water quality, not endow the Treasury. What better use of the penalty type payments in an action like this than to facilitate water quality improvements to the affected watershed in ways which could not be required under law."¹²⁸ Because the decree furthered the goals of the CWA and the intent of Congress, and because its terms apparently would be supervised by the State of Oregon, the decree was valid.¹²⁹

Whereas the district court in *Northwest Environmental Defense Center* took *ECD* one step further, the Third Circuit in *Public Interest Research Group of New Jersey, Inc. (PIRG) v. Powell Duffryn Terminals, Inc.*¹³⁰ took a more limited view. This case, decided one month after *ECD*, was a suit against an industry for several hundred violations of its CWA discharge permit.¹³¹ As a result of two district court actions in 1986 and 1989, the defendants had been found liable and were assessed the maximum penalty of \$4.2 million.¹³² The penalty was reduced

124. *Id.* at 20677.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

131. *Id.* at 69 (citing *Student Pub. Interest Res. Group of N.J., Inc. v. P.D. Oil and Chemical Storage, Inc.*, 627 F. Supp. 1074 (D.N.J. 1986) and *Public Interest Res. Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158 (D.N.J. 1989)).

132. *Id.*

to \$3.2 million, to be paid into a trust fund to improve New Jersey's environment.¹³³

Both Powell Duffryn and PIRG appealed the district court's decision, the defendant on standing and statute of limitations and the plaintiff on the reduction of the penalty. The court allowed the EPA to intervene even though it had not been a party in the lower court actions "to contest the creation of a private trust fund with civil penalties."¹³⁴ The circuit court resolved all issues of standing,¹³⁵ statute of limitations,¹³⁶ summary judgment on liability,¹³⁷ and calculation of penalties,¹³⁸ then turned its attention to the trust fund.

The court held that the district court had erred in creating the trust fund and ordered that the penalties be paid into the U.S. Treasury.¹³⁹ Relying on the legislative history of the CWA, the court concluded that "Congress intended that any penalties assessed in a citizen suit be treated as 'miscellaneous receipts.' Under the Miscellaneous Receipts Act, any person having custody of such public funds must deposit them in the Treasury."¹⁴⁰ In support, the court cited *Gwaltney*,¹⁴¹ *Middlesex County*,¹⁴² and numerous circuit court decisions including *ECD*.¹⁴³

PIRG argued that the trust fund could have been created by the district court as part of an order of injunctive relief.¹⁴⁴ The circuit court agreed, provided that there had been a nexus between the violations and the remedy.¹⁴⁵ However, the district court had already labelled the money as penalties, so there was no choice but to order it paid to the Treasury.¹⁴⁶

A district court in Indiana provided some insight into the policy and legal concerns behind *Powell Duffryn* in *United States*

133. *Powell Duffryn*, 720 F. Supp. at 1168.

134. *Powell Duffryn*, 913 F.2d at 70.

135. *Id.* at 70-73.

136. *Id.* at 73-76.

137. 913 F.2d at 76-79.

138. *Id.* at 79-81.

139. *Id.* at 82.

140. *Id.* at 80; see 31 U.S.C. § 3302(c)(1) (1988).

141. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 53 (1987).

142. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 n.25 (1981).

143. *Public Interest Res. Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 82 (3d Cir. 1990).

144. *Id.*

145. *Id.*

146. *Id.*

1994] LIMITS ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS 773

*v. Roll Coater, Inc.*¹⁴⁷ Here the EPA, not a private plaintiff, sued Roll Coater for violation of the industrial pretreatment requirements of the CWA.¹⁴⁸ The court found liability and assessed a penalty of over \$2 million.¹⁴⁹

Roll Coater requested that the court allow the penalty to be used for an environmental research project and the creation of a Center for Environmental Responsibility.¹⁵⁰ In support of its request, Roll Coater argued that equitable discretion allowed alternative forms of restitution.¹⁵¹ Roll Coater also cited the legislative history of the CWA amendments as supporting alternative projects to settle citizen suits.¹⁵² Finally, Roll Coater argued that the money was not characterized as a penalty, so it need not go to the Treasury.¹⁵³

The court rejected Roll Coater's arguments. First, it pointed out that the legislative history cited only applied in negotiated settlements, not court decisions.¹⁵⁴ Then it expressed approval of the concept of supplemental environmental projects, but refused to decide environmental policy by supporting a specific research project, stating that "a district court is not equipped to determine the best way to attack pollution problems in a given area."¹⁵⁵ Finally, it rejected Roll Coater's argument of equitable discretion: the parties stipulated that the equitable claims be dismissed, and since the only remedies available under the CWA were injunctive relief and penalties, the money was, by elimination, a penalty to be paid into the Treasury.¹⁵⁶ Much of the court's rationale on this point was taken verbatim from *Powell Duffryn*.¹⁵⁷

147. [1991] 21 Env'tl. L. Rep. (Env'tl. L. Inst.) 21073 (S.D. Ind. Mar. 22, 1991).

148. *Id.* at 21074. "Industrial pretreatment" describes regulations under the CWA intended to protect municipal sewage treatment plants from discharges of incompatible pollutants such as heavy metals or chlorinated solvents from an industry that uses the sewer system. *Id.* The regulations include technology-based limits for different categories of industries. *Id.* Roll Coater, which painted rolls of raw metal in preparation for further manufacturing, was regulated under the coil coating standards. *Id.*

149. *Id.* at 21077.

150. *Id.*

151. *Id.*

152. *Id.*; see H.R. CONF. REP. NO. 1004, *supra* note 61, at 1.

153. [1991] 21 Env'tl. L. Rep. (Env'tl. L. Inst.) at 21078.

154. *Id.* at 21077.

155. *Id.*

156. *Id.* at 21078.

157. *Id.* at 21077-78.

In *Atlantic States Legal Foundation, Inc. v. Simco Leather Corp.*,¹⁵⁸ the "nexus" requirement was at issue. The CWA citizen suit against an industrial discharger was to be settled by a consent decree containing a payment of \$2,120 to the Treasury and \$8,480 to a state university "to examine existing water quality conditions in the Mohawk River The focus of such study shall be upon impacts of . . . non-point source contributions."¹⁵⁹ The Justice Department objected because this provision had no nexus with the violation and therefore fell outside the EPA's settlement policy.¹⁶⁰

The court rejected the Justice Department's argument, announcing that it was not bound by the settlement policy. First, although the policy should receive some deference, it was intended only as guidance, and the EPA was free to change its own procedures as needed.¹⁶¹ Second, the policy was intended to apply to cases prosecuted by the EPA.¹⁶² Finally, the EPA had considerable discretion in approving mitigation projects, and was itself not bound by the nexus requirement.¹⁶³ The court then held that even if the policy was binding, the proposed decree comported with it anyway.¹⁶⁴ The proximity of the Mohawk River to Simco's receiving stream created an adequate nexus and furthered the objectives of the CWA.¹⁶⁵

*Friends of the Earth v. Archer Daniels Midland Co. (ADM)*¹⁶⁶ further reduced the impact of *ECD* by involving a new variation on the theme: a consent decree entered after a finding of liability. The plaintiffs had sued under the CWA for illegal discharges from the defendant's corn processing plant.¹⁶⁷ The plaintiffs originally filed suit in 1984, and in 1986 the court granted summary judgment to the plaintiffs on the defendant's liability

158. 755 F. Supp. 59 (N.D.N.Y. 1991).

159. *Id.*

160. *Id.* at 60; SETTLEMENT POLICY, *supra* note 45, at 7.

161. *Simco*, 755 F. Supp. at 61 (citing SETTLEMENT POLICY, *supra* note 45, at 8). Compare *Natural Resources Defense Council, Inc. v. Interstate Paper Corp.*, [1989] 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 20901 (S.D. Ga. Nov. 22, 1988) with SETTLEMENT POLICY, *supra* note 45.

162. 755 F. Supp. at 60 (citing SETTLEMENT POLICY, *supra* note 45, at 2).

163. *Id.*

164. *Id.*

165. *Id.* at 61-62 (comparing *Pennsylvania Env'tl. Defense Found. v. Bellefonte Borough*, 718 F. Supp. 431 (M.D. Pa. 1989)).

166. 780 F. Supp. 95 (N.D.N.Y. 1992).

167. *Id.* at 97.

1994] LIMITS ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS 775

for all violations through 1984.¹⁶⁸ Litigation on more recent offenses continued, and in 1989 the parties submitted a proposed consent decree requiring the defendant to pay \$25,000 to three environmental organizations.¹⁶⁹ The Government objected because the consent decree did not contain a penalty payable to the Treasury and because there was no nexus between the penalty and the violation.¹⁷⁰ The court held that the payments were penalties but, based on the court's interpretation of the legislative history of the 1987 CWA amendments, did not have to be paid to the Treasury.¹⁷¹ On the other hand, the payments could not go to wholly private entities.¹⁷² The court decided, based on the Oregon district court's holding in *ECD*,¹⁷³ that the decree must be rewritten, suggesting that it include payments to a state environmental project and a requirement that the payments relate to the harm.¹⁷⁴

Two weeks later, after the Ninth Circuit reversed *ECD*, both parties moved for reconsideration of the decision.¹⁷⁵ The court on reconsideration distinguished *ECD* despite the parties' efforts to convince the court otherwise: the partial summary judgment in 1986 established liability, and under *Roll Coater*, any payments were therefore penalties payable to the Treasury.¹⁷⁶ It did not matter that the defendant did not admit liability or that the parties wanted to simply "settle out of court."¹⁷⁷ Because liability had been found, the fine had to go to the Treasury.¹⁷⁸

168. *Id.*

169. *Id.* Friends of the Earth was not one of the organizations.

170. *Id.* at 98.

171. *Id.*

172. *Id.*

173. 703 F. Supp. 875, 876 (D. Or. 1989).

174. *ADM*, 780 F. Supp. at 98-99. For the original record of this decision, see *Friends of the Earth v. Archer Daniels Midland Co.*, [1990] 20 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 21385 (N.D.N.Y. July 19, 1990).

175. 780 F. Supp. at 99.

176. *Id.* at 101.

177. *Id.* at 101-02. *ADM* relied on *Connecticut Fund for the Env't v. Upjohn Co.*, No. N-85-349PCD, [1990-91] 21 *Env't Rep. Cas. (BNA)* 9 (Mar. 31, 1990). The court distinguished *Upjohn*, expressing doubts whether the settlement comported with the CWA. 780 F. Supp. at 102.

178. *Id.* at 102. In *Atlantic States Legal Found., Inc. v. Universal Tool and Stamping, Inc.*, the issue was the calculation of the amount of the penalty. *Atlantic States Legal Found., Inc. v. Universal Tool and Stamping, Inc.*, 786 F. Supp. 743, 746-47 (N.D. Ind. 1992). After that issue was resolved, both parties requested that the penalty be paid to a private organization. *Id.* at 754. The court, having found liability, summarily rejected the request and required that the money be paid to the

The most recent case deciding the fate of payments in a citizen-suit consent decree was *Hawaii's Thousand Friends v. Honolulu*.¹⁷⁹ A consent decree settled a 1989 lawsuit against the city and county of Honolulu for CWA violations in the sewage collection system.¹⁸⁰ Among other things, the decree required the defendants to take corrective action and pay \$25,000 to community organizations for each future illegal discharge from the system.¹⁸¹ The United States, exercising its section 505(c)(3) right, objected because the decree included no payment to the Treasury and asked the court to amend the decree to include a \$250,000 penalty.¹⁸²

The court held that the consent decree should be approved.¹⁸³ It said that the terms of the original agreement fulfilled the purposes of civil penalties—punishment, deterrence, and accessing profit.¹⁸⁴ It relied heavily on the fact that the defendant was not an industry but a municipality, whose taxpayers would be most burdened by payment to the Treasury.¹⁸⁵ Requiring the money go to the Treasury would serve no public purpose, whereas the agreement as written was “in the interests of the community and the environment” and met the mandates of the CWA.¹⁸⁶

The court relied on *ECD*.¹⁸⁷ The United States had relied on *ADM*, which the court rejected because its result was contrary to the Ninth Circuit position as expressed in *ECD*.¹⁸⁸ However, it interpreted *ECD* to mean that consent decrees in CWA citizen suits need not provide for payment to the Treasury.¹⁸⁹ The court argued that under the CWA, penalties are discretionary even when liability has been found.¹⁹⁰

Treasury. *Id.*

179. 149 F.R.D. 614 (D. Hawaii 1993).

180. *Id.* at 616.

181. *Id.*

182. *Id.*

183. *Id.* at 619.

184. *Id.* at 618.

185. *Id.*

186. *Id.* at 619. The court also noted that the United States had not been a party to the case, and in any case had its own enforcement action pending against Honolulu at which time it could seek fines. *Id.*

187. *Id.* at 616-18.

188. *Id.* at 618.

189. *Id.* at 617.

190. *Id.* at 618 (seeming to ignore Supreme Court decisions such as *Gwaltney* which have held that penalties are payable to the Treasury). In another case involving the

1994] LIMITS ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS 777

None of the cases decided since *ECD* challenge the proposition that if a consent decree precedes a finding of liability, the payments therein can go to supplemental environmental projects.¹⁹¹ However, there is a split as to what happens if liability has been found. In both cases from the Ninth Circuit, the court held that even if the payment is a penalty, it need not go to the Treasury.¹⁹² All other circuits have held that if liability is found, the money must go to the Treasury as a penalty, no matter what the circumstances or the desires of the parties.¹⁹³ As to the relationship required between the supplemental environmental project and the violation that caused the harm, the courts seem to favor a close relationship (i.e., the *Bellefonte Borough*¹⁹⁴ standard) over a looser approach (i.e., the *Interstate Paper* standard¹⁹⁵).

B. Government Policy

The EPA has strong reservations about supplemental environmental projects resulting from negotiated settlements of citizen suits. While accepting the projects on a limited basis, as a "supplement" to federal or state enforcement action,¹⁹⁶ the EPA has concerns for both legal and policy reasons about widespread use of the projects. Legal objections include:

1. The consent decrees are not out-of-court settlements. Although they are arrived at without a finding of liability, a district court must review and approve them, and the court retains jurisdiction—including enforcement power—over the

same parties, the issues were bypassed and inadequate treatment at Honolulu's sewage treatment plant. *Hawaii's Thousand Friends v. Honolulu*, 821 F. Supp. 1368 (D. Hawaii 1993). The court found Honolulu liable for 9870 violations of the CWA. *Id.* at 1394. In addition to assessing \$712,000 in civil penalties, the court used its authority to order equitable relief and ordered Honolulu to allocate \$1 million for studies to determine the impact of the discharges from the plant. *Id.* at 1397.

191. See, e.g., *supra* notes 176-78.

192. See *supra* notes 128-29, 187-90.

193. See *supra* notes 139-40, 156, 176-78.

194. See *supra* note 96 and accompanying text.

195. See *supra* note 80 and accompanying text.

196. Drelich Interview, *supra* note 13.

execution of the terms of the decree.¹⁹⁷ Thus, payments should be treated as if liability had been found.¹⁹⁸

2. Supplemental environmental projects are only appropriate as injunctive relief. If no such relief is called for, then any award is automatically a penalty.¹⁹⁹

3. Because the payments are penalties, the Miscellaneous Receipts Act applies, and the money is "due and owing" to the Treasury.²⁰⁰

The main policy objections to the widespread use of supplemental environmental projects are:

1. The interests of a national environmental advocacy group may not always coincide with correcting the immediate problem that the violation caused. While some of the proposed settlement projects may be laudable, there is not always enough connection between the project and the violation, so the project may not adequately address the environmental impact that the violation caused.²⁰¹

2. Government prosecution of violators is undermined. Widespread use of supplemental environmental projects in negotiated settlements could mask their use as attempts to avoid liability for violations and give the perception that the violators, by funding a beneficial project, are "good guys."²⁰²

With the stated purpose of "avoiding the difficulties which occasionally characterized [the past use of supplemental environmental projects]" the EPA in 1991 issued a new penalty policy addressing the projects.²⁰³ The policy indicates that deterrence and punishment of violations are as important to resolving violations as corrective action.

The introduction to the policy reiterates EPA's general objectives, the most important being attainment of compliance by

197. *Id.*; see *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1124 (D.C. Cir. 1983) (citing *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975) ("[C]onsent decrees and orders have attributes both of contracts and of judicial decrees [T]hey . . . must be approved by the court")).

198. *Id.*

199. *Id.* This argument was used successfully in *United States v. Roll Coater, Inc.*, [1991] 21 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 21073, 21077-78 (S.D. Ind. Mar. 22, 1991).

200. *Id.*; see 31 U.S.C. § 3302 (1988).

201. See 31 U.S.C. § 3302 (1988).

202. *Id.* For a critique of some of these arguments, see Mann, *supra* note 4, at 196-200. Many of EPA's objections echo those that were raised as justification of the 1987 CWA amendments.

203. SUPPLEMENTAL PROJECT POLICY, *supra* note 27, cover memo at 2.

1994] LIMITS ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS 779

the violator.²⁰⁴ As stated in the earlier penalty policies, a substantial monetary penalty is required, at a level which "captures the [violator's] economic benefit of noncompliance plus some appreciable portion of the gravity component"²⁰⁵ The required relationship between the violation and the project is for the first time described as a "nexus," after being referred to by that term earlier only in court decisions.²⁰⁶

The substantive portion of the policy is notably more specific than the earlier policy statements. The resulting document at the same time clarifies and restricts what is acceptable for a supplemental environmental project.

The policy contains eleven sections plus the introductory section A. Section B describes five categories of potentially acceptable supplemental environmental projects: pollution prevention, pollution reduction, environmental restoration, environmental auditing, and enforcement-related public awareness.²⁰⁷ The projects must generally correct or prevent problems at the facility responsible for the violations or address the specific environmental damage caused by the violations.²⁰⁸ The nexus requirement applies to all but the public awareness projects, which "must be related to the type of violations which are/were the subject of the underlying lawsuit."²⁰⁹ Each project is defined in detail, including the responsibilities of the proponent of the project.²¹⁰

Perhaps more important, section B also describes projects that may not be considered: general educational or environmental awareness; contribution to research at a college or university, whether concerning the environmental area of noncompliance or

204. *Id.* at 1-2.

205. *Id.* at 1; see SETTLEMENT POLICY, *supra* note 45, at 7.

206. See, e.g., *Public Interest Res. Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 82 (3d Cir. 1990); SETTLEMENT POLICY, *supra* note 45, at 7 ("The [project] is most likely to be . . . acceptable . . . if it closely addresses the environmental effects of the defendant's violation.").

207. SUPPLEMENTAL PROJECT POLICY, *supra* note 27, at 2-4.

208. *Id.*

209. *Id.* at 4.

210. *Id.* at 2-6. For instance, a pollution reduction project must "[go] substantially beyond compliance . . . to further reduce the amount of pollution that would otherwise be discharged Examples include a project that reduces the discharge of pollutants through more effective . . . removal technologies" *Id.* at 2. "If the [violator] substitutes another substance for the one being phased out, he has the burden to demonstrate that the substance is non-polluting" *Id.* at 3.

not; or any project unrelated to the enforcement action even if beneficial to the community.²¹¹ Many of the supplemental projects approved in the past, either without or in spite of Government objection, would not be approved under this policy. Examples include many of the educational and research projects in *3M*,²¹² the donation to the Georgia Conservancy in *Interstate Paper*,²¹³ and conceivably even the project at issue in *ECD*.²¹⁴ Funding various environmental organizations for their efforts to maintain and protect water quality in Oregon might be too general to meet the requirement of being "related to the type of violations which [were] the subject of the underlying lawsuit" and could even be considered a nonapprovable "general educational or environmental awareness-raising project."²¹⁵

Section C describes the nexus requirement in detail for each of the potentially acceptable types of projects.²¹⁶ Examples are given of each type of project, along with a description of how the EPA would evaluate the project. A typical acceptable remediation project would be one "requiring the purchase of wetlands which then act to purge pollutants EPA will evaluate the nexus between the project and the violation in terms of both geography and the . . . benefits of the wetlands."²¹⁷

Under section C, the nexus for most types of projects may be either vertical or horizontal. A vertical nexus exists "when the supplemental project operates to reduce pollutant loadings to a given environmental medium (i.e., air, water, land) to offset earlier excess loadings of the same pollutant in the same medium which were created by the violation in question."²¹⁸ By contrast, a horizontal nexus exists when the "project involves either (a) relief for different media at a given facility or (b) relief for the same medium at different facilities."²¹⁹ Because the connection between a horizontal violation nexus and remedy is less than with a vertical nexus, it "must be carefully scrutinized."²²⁰

211. *Id.* at 4-5.

212. *See Atlantic States Legal Found., Inc. v. Minnesota Mining and Mfg.*, [1987-88] 18 Env't Rep. Cas. (BNA) 2395 (D. Minn. Mar. 18, 1988).

213. [1989] 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 20901 (S.D. Ga. Nov. 22, 1988).

214. 909 F.2d 1350 (9th Cir. 1990).

215. *Id.* at 1352; SUPPLEMENTAL PROJECT POLICY, *supra* note 27, at 4-5.

216. SUPPLEMENTAL PROJECT POLICY, *supra* note 27, at 5-8.

217. *Id.* at 5.

218. *Id.* at 6.

219. *Id.* at 7.

220. *Id.*

1994] LIMITS ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS 781

Again, under the strict nexus criteria, a project such as the one in *ECD* might not pass muster. Since a donation for general water quality improvement might have benefitted different waters than those affected by *ECD*'s violations, only a horizontal nexus would have existed, possibly not surviving elevated scrutiny.²²¹

Sections D and E additionally restrict who may submit a supplemental environmental project for approval. Under section D, the violator's compliance history and resources available to complete a project are considered in the EPA's evaluation.²²² Section E warns that projects that are primarily for the benefit of the violator, rather than the public, would not be approved.²²³ A project which is a "sound business practice," that would essentially reward the violator for undertaking activities obviously in his self-interest, would not be within the Government's interest.²²⁴ The EPA may approve pollution prevention projects that are "sound business practice" if the environmental benefit is also so substantial that approval would be in the best public interest.²²⁵

The remaining sections of the policy also reflect the EPA's stricter limitations on supplemental environmental projects. Section F reiterates that deterrence is as important as environmental restoration, so a substantial monetary penalty must be included in any settlement.²²⁶ An approved project may not mitigate the penalty by "more than the after-tax amount the violator spends on the project."²²⁷ Section G narrowly limits approval of study projects to those that (1) include a commitment to implement the results and (2) are part of an EPA-approved set of actions toward overall environmental improvement of the violator's facility.²²⁸ Sections J and K provide criteria for EPA documentation and oversight of implementation of the projects.²²⁹

221. 909 F.2d at 1352; SUPPLEMENTAL PROJECT POLICY, *supra* note 27, at 9.

222. SUPPLEMENTAL PROJECT POLICY, *supra* note 27, at 8, 9.

223. *Id.* at 9.

224. *Id.*

225. *Id.*

226. *Id.* at 9-10.

227. *Id.* at 10.

228. *Id.* at 10-11.

229. *Id.* at 12-13. Section H allows substitute performance of the project under limited circumstances. *Id.* at 11. Section I describes EPA concurrence procedures for projects which cross between media, EPA regions, or both. *Id.* at 12. Section L notes

On its face, the new policy merely clarifies what are and what are not acceptable supplemental projects. In practice, however, its narrow boundaries may serve to reduce the number of proposed supplemental environmental projects simply because fewer project options would be available to any respondent.

C. Current Supplemental Environmental Projects

A survey of recent negotiated settlements of CWA citizen suits which included supplemental environmental projects does not conclusively show that the limits imposed by either the supplemental project policy or recent court decisions are adversely affecting the practice. In *Citizens for a Better Environment v. Minneapolis*,²³⁰ a citizen suit against the city was settled by consent decree. The city agreed to pay \$260,000 for nine environmental projects, including a spill prevention project and studies relating to the Mississippi River, processes at the municipal wastewater plant named in the suit, and nonpoint sources.²³¹ The city also had to pay \$100,000 to the State of Minnesota, which joined in the suit.²³²

The citizen suit in *Massachusetts Public Interest Research Group v. ICI Americas Inc.* for illegal discharges to a tributary of the Taunton River was settled by a consent decree which included a \$700,000 penalty against ICI.²³³ The United States Treasury received \$100,000 with the remaining \$600,000 to "go to local environmental projects to preserve and restore the Taunton River watershed"²³⁴ Between the filing of the suit and the settlement, the industry negotiated a separate consent order with the EPA and the State of Massachusetts over the same violations, but the citizen suit was not dismissed despite the industry's arguments.²³⁵ The state environmental regulatory agency concurred with the settlement.²³⁶

that this policy supersedes parts of the Penalty and Settlement Policies and will be followed by a specific policy for each medium, presumably including water. *Id.* at 13.

230. [1991-92] 22 Env't Rep. Cas. (BNA) 2670 (D. Minn. Mar. 27, 1992).

231. *Id.*

232. *Id.*

233. [1992] 23 Env't Rep. Cas. (BNA) 434 (D. Mass. May 19, 1992).

234. *Id.*

235. *Id.*

236. *Id.*

1994] LIMITS ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS 783

The citizen suit in *Arkansas Wildlife Federation v. Bekaert Corp.*²³⁷ was settled by a consent decree in which the alleged violator, accused of illegal discharges to the Arkansas River, agreed to pay \$245,000 for wetlands acquisition and study projects on the Arkansas River.²³⁸ The settlement also included a \$30,000 penalty payment to the Treasury.²³⁹ As with *ICI Americas*, the citizen suit proceeded despite Bekaert's claim that EPA administrative action precluded the suit.²⁴⁰ In both cases, the decrees required adherence to a compliance schedule that the EPA had set.²⁴¹

Under the settlement in *Natural Resources Defense Council, Inc. v. ARCO Alaska, Inc.*,²⁴² ARCO agreed to pay a Native Alaskan organization \$400,000 for scholarships to study natural resource management.²⁴³ ARCO also agreed to pay \$200,000 for allegedly dumping oil wastes into wetlands on Alaska's North Slope.²⁴⁴ ARCO agreed to study alternative methods of disposing of oil wastes.²⁴⁵

Finally, in *Massachusetts Public Interest Research Group v. General Electric Co.*²⁴⁶ a citizen suit settled when GE agreed to pay \$825,000 to the Saugus River Watershed Council to improve the river area.²⁴⁷ GE, which had been sued for alleged illegal discharges of petroleum derivatives, also agreed to pay \$100,000 to the U.S. Park Service.²⁴⁸

Some significant similarities between these cases are evident. All five agreements included, in addition to supplemental environmental projects, penalty payments to a state or federal treasury. Most of the agreements included some cooperation between the citizen-plaintiff and a government: in *Minneapolis* the state was a co-plaintiff;²⁴⁹ in *ICI Americas* and *Bekaert* the decrees included EPA compliance schedules;²⁵⁰ and in *ICI*

237. [1992] 23 Env't Rep. Cas. (BNA) 1200 (W.D. Ark. Aug. 12, 1992).

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. [1993] 24 Env't Rep. Cas. (BNA) 12 (D. Alaska May 3, 1993).

243. *Id.*

244. *Id.*

245. *Id.*

246. [1993-94] 24 Env't Rep. Cas. (BNA) 1207 (D. Mass. Oct. 15, 1993).

247. *Id.*

248. *Id.*

249. [1991-92] 22 Env't Rep. Cas. (BNA) 2670 (D. Minn. Mar. 27, 1992).

250. *Arkansas Wildlife Fed'n v. Bekaert Corp.*, [1992] 23 Env't Rep. Cas. (BNA)

Americas the administrative agency supported the settlement.²⁵¹ Finally, the payments all had some connection with the harm caused by the violation, or the waterbody or area affected.

D. Proposed CWA Reauthorization

On June 15, 1993, Senators Baucus and Chafee introduced into Congress the bill for reauthorization of the CWA.²⁵² The bill includes amendments to both sections 309 and 505 of the CWA.²⁵³ In both sections, as amended, district courts would be allowed to allocate all or part of a civil penalty to "be used for a beneficial project to enhance public health or the environment by restoring or otherwise improving, in a manner consistent with [the CWA], the water quality, wildlife or habitat of the waterbody in which the violation occurred."²⁵⁴ The bill would also authorize a court to order a defendant, in either a government action or a citizen suit, to restore the natural resources damaged or destroyed as the result of a violation.²⁵⁵ The maximum cost of the restoration could not exceed the maximum amount of a civil penalty under the CWA.²⁵⁶

This language resembles that incorporated into the 1990 Clean Air Act amendments, which allows the court in any citizen suit to order that penalties be "used in beneficial mitigation projects which are consistent with [the Clean Air Act] and enhance the public health or environment."²⁵⁷ Here the limit is not the maximum civil penalty, but a flat \$100,000.²⁵⁸ The penalties may be alternatively deposited into a Treasury fund for licensing and other services.²⁵⁹

1200 (W.D. Ark. Aug. 12, 1992); *Massachusetts Pub. Interest Res. Group v. ICI Americas Inc.*, [1992] 23 Env't Rep. Cas. (BNA) 434 (D. Mass. May 19, 1992).

251. *ICI Americas*, 23 Env't Rep. Cas. at 434.

252. S. 1114, 103d Cong., 1st Sess. (1993).

253. *Id.* § 503.

254. *Id.* § 503(b)(1)(A)-(B). A criminal penalty could be similarly allocated. *Id.* § 503(b)(1)(C).

255. *Id.* § 503(b)(2)(A)-(B).

256. *Id.*

257. 42 U.S.C. § 7604(g)(2) (Supp. III 1991).

258. *Id.*

259. *Id.* § 7604(g)(1). On April 21, 1993, Rep. Visclosky proposed the establishment of a National Clean Water Trust Fund into which penalties, including payments under consent decrees, would be deposited. 139 CONG. REC. E999 (daily ed. Apr. 21, 1993) (statement of Rep. Visclosky). Remedial projects bankrolled by the Fund would

The proposed CWA amendments do not specifically address negotiated settlements. However, by no longer requiring that a civil penalty be paid to the Treasury after liability is found, the court decision as to whether a citizen suit is a penalty is no longer necessary. Rather than treating payments under negotiated settlements as civil penalties, the amendments would treat civil penalties as payments under negotiated settlements as established by *ECD*, so long as the nexus requirement is met.²⁶⁰

CONCLUSION

A history of supplemental environmental projects indicates that after their initial use in CWA citizen suits in the early 1980s, the practice caught on gradually; of the small but significant number of suits settled out of court, many included supplemental projects.²⁶¹ During this early phase, EPA policy barely acknowledged mitigation projects.²⁶² As the frequency of supplemental projects grew, so did the Government's concerns. The projects received specific notice in EPA policy statements along with the admonition that they were to be supplemental to and accompanied by a substantial penalty to the Treasury.²⁶³

The Government's concern, heightened as supplemental environmental projects continued to increase in use, resulted in the 1987 CWA amendments, which gave the Government power to object to proposed consent agreements.²⁶⁴ The amendments did not, however, prevent a continued increase in the projects, and the conflicting interests of the Government and environmental group-plaintiffs began to collide in a series of court actions culminating with *Sierra Club, Inc. v. Environmental Controls Design, Inc.*,²⁶⁵ which was thought to resolve the matter when it expressly legitimized supplemental environmental projects in negotiated, preliability settlements.²⁶⁶

have to be located in the same EPA region as the violation and be applied to environmental impacts associated with the problem which caused the penalty. *Id.*

260. At this writing, S. 1114 had not reached the full Senate.

261. See JORGENSEN & KIMMEL, *supra* note 24.

262. See, e.g., PENALTY POLICY, *supra* note 44, at 6.

263. See SETTLEMENT POLICY, *supra* note 45, at 7.

264. See *supra* notes 58-65 and accompanying text.

265. 909 F.2d 1350 (9th Cir. 1990).

266. See, e.g., *supra* notes 32, 122 and accompanying text.

The four years since *ECD* can be characterized as a government counterattack in the form of repeated challenges to supplemental environmental projects²⁶⁷ and the supplemental projects policy,²⁶⁸ which resulted in clear boundaries of what constitute acceptable conditions for supplemental environmental projects. However narrow these boundaries, they are firm: despite EPA's stated objections, the supplemental environmental policy acknowledges, by limiting the projects, that they are here to stay.²⁶⁹

Some conclusions can safely be drawn about the current status of supplemental environmental projects as applied to negotiated settlements of CWA citizen suits. First, as long as no liability has been found, any settlement of a suit may include a supplemental environmental project. However, except for the Ninth Circuit, courts have almost automatically required that any payment imposed after liability is a penalty and must go to the Treasury. Some penalty to either a state or federal treasury appears to be necessary.²⁷⁰ All of the documented uncontested settlements in 1992 and 1993 have included penalty payments to state or federal treasuries.²⁷¹ A cynical interpretation might be that as long as the Government gets its cut it will not contest the settlement regardless of its other terms. A less jaded interpretation would be that including both penalties and projects is a practical compromise, adhering to the letter of current EPA policy.²⁷²

Another requirement for an approvable project is that it clearly be in the public interest. Any "sound business practice" project will be evaluated with suspicion and most likely be rejected.²⁷³

267. See, e.g., *Friends of the Earth v. Archer Daniels Midland Co.*, 780 F. Supp. 95 (N.D.N.Y. 1992).

268. See *supra* notes 203-29 and accompanying text.

269. See, e.g., SUPPLEMENTAL PROJECT POLICY, *supra* note 27, at 1 ("EPA will expand its approach to Supplemental Environmental Projects while also maintaining a nexus (relationship) between the original violation and the supplemental project.").

270. *Id.* at 10.

271. See *supra* notes 230, 233, 237, 242, 246 and accompanying text. Only courts in the Ninth Circuit appear willing to forgo this requirement. See *supra* note 192 and accompanying text.

272. See Thagard, *supra* note 34, at 531 and accompanying text which recommends that including a penalty in every consent decree will acknowledge the government's requirement, thus facilitating approval of a supplemental environmental project. *Id.* She also recommends that the order be framed as equitable relief and that the proposed project be sure to meet the nexus requirement. *Id.*

273. SUPPLEMENTAL PROJECT POLICY, *supra* note 27, at 9, 10.

1994] LIMITS ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS 787

There must also be a clear "nexus" or relationship, as defined in the supplemental project policy, between the project and the violation.²⁷⁴

The best approach toward resolving violations of the CWA, or any environmental statute, might well come from improved cooperation and communication between a citizen-plaintiff and the Government. This may seem idealistic, if only because the two entities are not always pursuing identical goals.²⁷⁵ However, the reason that all three of the recent consent decrees were uncontested could have been that an administrative agency played some part in the action and continued positive results might regularize the practice.²⁷⁶

Should the CWA amendments pass as introduced, supplemental environmental projects could be an option in all CWA actions, government enforcement and citizen suits, consent decrees, and court-determined liability. The nexus requirement would remain. At present, the supplemental environmental project appears to be a reliable option for a remedy in any CWA citizen suit that is settled before liability is found. But with the passage of the CWA amendments, a citizen-plaintiff could ask nothing more than direct restoration of the area affected by the violation and theoretically not include the U.S. Treasury at all, even if the court finds that the defendant violated the Clean Water Act. With a stroke, the supplemental environmental project would move from grudging toleration to full acceptance as a CWA remedy.

Michael Paul Stevens

274. *Id.* at 5-8.

275. This idea has been proposed before, with no lasting results. See *Administrative Conference Recommends Improved Private, Federal Coordination*, [1984-85] 15 Env't Rep. Cas. (BNA) 2193 (Apr. 12, 1985).

276. See *supra* notes 249-51.

